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September 15, 1997

By Hand Delivery

Mr. William F. Caton, Acting Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, NW  
Washington, D.C. 20554

Re: CC Docket Number 94-129

Dear Mr. Caton:

Please find enclosed an original and eleven (11) copies of the Comments of the Vermont Public Service Board in the above docket. I understand that by filing eleven copies, each Commissioner will receive a personal copy of these comments.

I also enclose one additional copy, marked "STAMP COPY." Please date stamp this copy and return it to the person delivering this filing.

Sincerely,

*Erica Ross for Peter Bluhm*  
Peter M. Bluhm, Esq.  
Director of Policy

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Implementation  
of the Subscriber Carrier Selection  
Changes Provisions of the  
Telecommunications Act of 1996

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CC Docket No. 94-129

**COMMENTS OF THE VERMONT PUBLIC SERVICE BOARD**

September 15, 1997

Peter M. Bluhm, Esq.  
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The Vermont Public Service Board, a state Commission responsible for regulating telecommunications services in Vermont, welcomes this opportunity to comment on slamming issues.

Interstate slamming is a continuing problem for Vermonters. Vermonters frequently complain of unauthorized changes to their presubscribed interstate toll carriers. In the next few months, Vermont will implement intrastate presubscription, and competitive local exchange service is beginning to be available in Vermont. Slamming is likely to become a problem in both of these new areas as well.

**I. THE COMMISSION SHOULD ELIMINATE THE WELCOME PACKAGE AS A MEANS OF VERIFYING A CONSUMER'S CHANGE OF PRESUBSCRIBED CARRIER.**

Section 64.1150(f) of the Commission's rules prohibit negative-option Letters of Agency. However, section 64.1100(d) authorizes the use of a postcard in a "welcome package" as a means of verifying that a consumer has consented to a change of presubscribed carrier. A consumer receiving such a welcome package will be deemed to have verified his or her choice of new carrier if the consumer fails to return the postcard.

In its Further Notice of Proposed Rulemaking, the Commission has sought comment on whether the use of such postcards might be used to circumvent the subsection 1150(f) prohibition of negative-option Letters of Agency ("LOAs"). The Vermont Public Service Board urges the Commission to abolish the postcard method of verification.

During the 1996 session, the Vermont Legislature took up the slamming issue. On May 22, 1996, some three months after passage of the Telecommunications Act of 1996, the following statute was enacted.

§ 208a.       SELECTION OF PRIMARY INTEREXCHANGE CARRIER

(a) No provider of telecommunications interexchange services shall submit a primary interexchange carrier change order to a local exchange telecommunications company unless and until the interexchange carrier has obtained express authorization from the customer for the change. Upon request of the customer, offers to provide telecommunications interexchange services shall be sent to the customer in written form describing the terms and conditions of service. As used in this section, "express authorization" means an express, affirmative act by the customer clearly agreeing to the change in primary interexchange carrier, in the form of a written authorization, a customer initiated call to the interexchange carrier, an oral authorization verified by an independent third party recorded, electronic authorization, or some other form of recorded authorization.

(b) If the public service board determines after opportunity for hearing that an interexchange carrier has failed to comply with this section, or rules adopted by the board in submitting a primary interexchange carrier change order, in addition to other penalties under this title, the board shall direct the interexchange carrier to reimburse the local exchange carrier for any costs associated with the invalid primary interexchange carrier change order.

(c) The public service board shall adopt such rules as are necessary to carry out the purposes of this section. Such rules shall be no less stringent than the federal rules relating to primary interexchange carrier changes, and shall include such further provisions as are needed to implement the provisions of this section.<sup>1</sup>

The key element of this Vermont statute is the requirement of "express authorization" in subsection (a). That language was chosen purposefully to permit three of the four forms of Primary

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<sup>1</sup> Public Acts of Vermont, 1995 (Adjourned Session), No. 183, § 2 (approved May 22, 1996)(now codified as 30 V.S.A. § 208a)(emphasis added).

Interexchange Carrier ("PIC") change confirmation currently authorized by the Commission's rules, but also to prohibit verification by the welcome package postcard.

One reason for this legislative action was the ease with which an unethical carrier who intends to slam a customer can abuse the postcard method of verification. If a carrier should intentionally slam a customer, under the Commission's current rules, that carrier can then send the customer a welcome package with a postcard. If the customer then should fail to return the card, for whatever reason, the slamming carrier can continue to benefit from its improper action, even though the customer never made an affirmative decision to change carriers.

The Legislature's rejection of the negative-option should be given considerable weight by the Commission. As a representative body, the Vermont Legislature has aptly expressed the public sentiment concerning appropriate forms of verification for carrier changes.

The Commission should abolish the welcome package since it affords an opportunity for abuse by carriers and because it is contrary to the public perception of how carrier changes should be processed.

II. THE COMMISSION SHOULD ACKNOWLEDGE THAT STATES HAVE CONCURRENT ENFORCEMENT JURISDICTION OVER INTERSTATE TOLL SLAMMING AND ALSO THAT STATES HAVE AUTHORITY TO ADOPT COMPLEMENTARY, BUT NOT CONFLICTING, REQUIREMENTS CONCERNING PRESUBSCRIBED LOCAL AND TOLL SERVICE PROVIDERS.

30 V.S.A. § 208a, quoted above, was enacted in 1996, a few months after the enactment of the Telecommunications Act of 1996. In enacting this statute, the Vermont Legislature made an important statement about the importance to Vermonters of having an available and effective forum in Vermont capable of dealing with slamming complaints. While the FCC does take enforcement action pursuant to slamming complaints, Vermont consumers continue to believe that they should be able to bring slamming complaints directly to their state regulators. By passing section 208a, the Legislature indicated that Vermont consumers should continue to have this right.

There is an obvious need for concurrent enforcement jurisdiction. Vermont does not yet have intrastate presubscription,<sup>2</sup> yet the Vermont Department of Public Service (DPS)<sup>3</sup> receives frequent complaints of unauthorized changes of interstate presubscribed carriers.<sup>4</sup> Moreover, the trend of complaints is upward. During the first six months of 1997, the DPS received 53 complaints of interstate slamming. This was three times the number of complaints filed during all of 1996.

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<sup>2</sup> Intrastate presubscription will be in place for most customers on November 6, 1997.

<sup>3</sup> The Department of Public Service is a different state agency. It is charged with advocacy and planning responsibilities concerning utility matters, and operates a consumer complaint hotline.

<sup>4</sup> Vermont does not have any reason to believe that customer-initiated calls are generating any significant slamming complaints. Rather, nearly all of the complaints received in Vermont involve carrier-initiated calling.

Despite the FCC's substantial efforts to prevent slamming, it is apparent that better enforcement is needed. The Commission should acknowledge that state enforcement actions against interstate slamming can be and are consistent with and supportive of its own enforcement activity. For this reason, the Commission should acknowledge that states have concurrent enforcement jurisdiction over all slamming complaints.

Historically, the Commission has not only permitted states to enforce the Commission's slamming rules, but it has allowed states to adopt their own supplemental rules. For example, in its "LOA Order" issued in June of 1995, the Commission expressly declined to preempt state jurisdiction over slamming. The order noted that state action regarding slamming "appeared consistent" with the Commission's own actions, and that specific preemption questions could be considered on a case-by-case basis.<sup>5</sup>

The LOA Order also acknowledged the existence of state slamming rules. In discussing the phrasing of a Letter of Agency ("LOA"). The Commission said:

We refrain from prescribing specific LOA language at this time. We agree with some of the commenters that differing state requirements and differences in the target market for individual promotional campaigns indicate that IXCs may be better able to tailor the specific language in a way that clearly informs the consumer of the impending choice.<sup>6</sup>

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<sup>5</sup> Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, FCC 95-225, CC Docket No. 94-129, Report and Order of June 13, 1995, at para. 43.

<sup>6</sup> Id. at para. 10. (Emphasis added.)

Only a few months later, the Common Carrier Bureau issued a letter opinion that was even more supportive of state authority to act against slamming.<sup>7</sup> A Vermont Assistant Attorney General wrote to the Bureau asking whether it was permissible to enforce Vermont law against a company accused of slamming. The state had filed a complaint in state court alleging that the carrier had failed in some instances to obtain consumer authorization and asserting that this violated the Vermont Consumer Fraud Act. The state also alleged that the carrier's written authorization form consisted of small print above the endorsement line on a check, and that this was also a violation of the Consumer Fraud Act "given its tiny size and its obscurity in the promotional mailing."

In summary, the state's complaint was filed under a state statute, and only some of the alleged acts by defendant amounted to a violation of the Commission's rules. The Common Carrier Bureau had to make two rulings:

- whether the FCC's own prohibition on unauthorized PIC changes can be enforced through a state Consumer Fraud Law; and
- whether a state consumer fraud law can impose more stringent requirements than those established in the FCC's own rules, in this case requirements about the location and size of the print on the LOA.

The Common Carrier Bureau ruled for the state on both questions. On the question of concurrent enforcement jurisdiction, the Common Carrier Bureau noted that both jurisdictions

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<sup>7</sup> Letter of September 22, 1995 from Mary Beth Richards, Deputy Chief, Common Carrier Bureau, to Elliot Burg, Esq., Assistant Attorney General, 11 FCC.Rcd. 1899, 1995 WL 561599 (F.C.C.)

prohibited the switching of a consumer's long-distance carrier without proper authorization. The Bureau saw the state efforts as "advancing rather than frustrating Commission objectives."<sup>8</sup>

The Bureau also ruled on whether the Vermont Consumer Fraud Law could establish requirements about print size on a check serving as a letter of authorization. The Bureau noted generally that:

the possibility that a state may seek to impose more stringent requirements to afford greater protection to consumers does not automatically render such requirements impermissibly inconsistent with the Commission's rules as long as it remains possible for a carrier to comply with both the state and federal standards.<sup>9</sup>

On the particular question of whether Vermont could require a particular wording or size of type in the LOA, the Common Carrier Bureau noted that the then-recent LOA Order had refrained from dictating the precise language that carriers must use in an LOA, in part because of the variety of existing state requirements. The Bureau concluded that the FCC had

retained flexibility (regarding LOA format) in its rules in part to enable IXC's to comply with its rules as well as additional standards in recognition of a state's potential interest in providing different or greater protection for its residents.<sup>10</sup>

Thus by the end of 1995, the FCC had confirmed that the states not only may enforce the FCC's own rules, but also that states may offer their citizens "greater protection" through supplemental rules, at least as to the form and content of the LOA.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

The Telecommunications Act of 1996 has fundamentally changed many things in the relationship between the FCC and state Commissions, but it need not change these conclusions reached in 1995. Section 258 of the Act provides, in part, as follows:

**Sec. 258. Illegal Changes in Subscriber Carrier Selections**

(a) **PROHIBITION.** No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe. Nothing in this section shall preclude any State Commission from enforcing such procedures with respect to intrastate services.

There are two ambiguities in this language. One ambiguity is found in the second sentence which explicitly protects the rights of states to enforce FCC "procedures" as to intrastate services. Some might read the statute as asserting the converse proposition as well: that states have no authority to enforce the Commission's "procedures" with regard to interstate services. This conclusion is not logically necessary, and it should be avoided.

As noted above, interstate slamming remains a serious problem in Vermont, and is a problem that the Vermont Legislature expects to be addressed by its state regulators. For these reasons, the Commission should affirm the continued vitality of state efforts to enforce slamming rules, as it did in 1995.

The first sentence of subsection 258(a) also contains an ambiguity. It clearly establishes FCC rulemaking authority over all kinds of changes to a customer's presubscribed carrier, whether local or toll. Some, however, might assert that Congress also intended that the FCC's "procedures" are to be the only ones applicable to a carrier seeking an LOA in Vermont. The Commission should

resist this interpretation. As it did in 1995, the Commission should affirm that each state retains the power to establish "different or greater protection" for its citizens.

Of course, state regulations cannot conflict with those prescribed by the Commission. For example, if the Commission requires that an LOA be on a paper or printed in a particular size type, a state could not require a different standard. Since no carrier could comply with both requirements, the two requirements would be incompatible, and the state rule would be preempted.

However, state regulations are unlikely to be in direct conflict with the Commission's regulations. More commonly, states impose supplemental protections. For example, the following supplemental rules are now in effect in Vermont. They apply to both changes of local and of intrastate and interstate toll carriers.

- i. LOAs must describe a toll-free number that the customer can call to verify whether the change of carrier has occurred.
- ii. LOAs must describe a toll-free telephone number and mailing address of the Consumer Affairs Division of the Department of Public Service, and must inform the consumer of his or her right to file a complaint at that division.
- iii. Upon request of a customer, a carrier seeking to make a presubscribed local or toll carrier change must send a written description to the customer describing the terms and conditions of service.

While each of these requirements may impose some marginal burden on carriers, each is a reasonable exercise of Vermont's sovereign right to protect its people. Moreover, none of these requirements conflicts with the federal procedures authorized under section 258 of the Act, since all carriers can comply with the Commission's rules as well as these rules.

If a state slamming regulation should be challenged, the Commission should apply the same standard of review that it intended to apply when it issued the LOA Order in 1995. That is, it

should attempt to ascertain whether the state regulation is inconsistent with its own procedures. If so, the state regulation should be preempted. However, where a state regulation merely prescribes additional standards based upon the state's potential interest in providing different or greater protection for its residents, the Commission should not interfere with such regulation.

**III. IF THE COMMISSION DOES NOT AGREE THAT STATES RETAIN THE AUTHORITY TO SUPPLEMENT FEDERAL RULES AND ENFORCEMENT, IT SHOULD REQUIRE CARRIERS TO ESTABLISH AND SUPPORT A NATIONWIDE SLAMMING COMPLAINT LINE AND A METHOD FOR CONSUMERS TO IDENTIFY THEIR CURRENT CARRIERS.**

In the event that the Commission does not concur with the above comments concerning state jurisdiction, and in the event that the Commission believes it can and should preempt state regulation of slamming, it should then enact two additional protections for consumers.

First, the Commission should require telecommunications carriers to contribute to the support of a national complaint clearing house. While this clearing house should be supported by carriers, it should be operated independently.

The clearing house should have authority to investigate consumer slamming complaints and to promote voluntary settlements, including financial compensation to customers and harmed carriers. If no settlement is reached for an apparently meritorious complaint, the clearing house should have authority to:

- arbitrate the complaint if the consumer so consents; or
- refer the complaint file to the Commission for further action.

In the latter event, the prescreening function served by such a clearing house would increase the effectiveness of the Commission's own enforcement efforts by allowing Commission staff to proceed more expeditiously based upon a completed investigative file.

Second, the Commission should require carriers to provide a method by which a consumer can determine the identity of his or her local exchange carrier, intrastate carrier and interstate carrier.

One mechanism to provide this information would be through a toll-free national database. Although this fact is not widely known, it is now possible in many areas for a customer presubscribed to a facilities-based carrier to ascertain the identity of this carrier by dialing a particular access code. One problem with this system is that its availability is not widely known. A more serious problem concerns resellers, however. When a customer is presubscribed to a reseller, the existing system merely reports the identity of the reseller's underlying carrier. Under some circumstances, a customer slammed by a reseller cannot ascertain from any source whether he or she has been slammed. Rather, the consumer must wait for the new carrier's monthly bill. If the Commission were to establish a toll-free information line, consumers who think they may have been slammed will no longer have to wait a full billing cycle before determining the identity of their current carrier.

### Conclusion

The Commission should eliminate the welcome package as a means of verifying a consumer's change of presubscribed carrier. The Commission should acknowledge that states have concurrent jurisdiction to enforce rules prescribing procedures for a change of interstate toll carrier and also

that states have authority to adopt complementary, but not conflicting, requirements concerning changes to presubscribed local and toll carriers. Finally, if the Commission does not agree that states retain the authority to supplement federal rules and enforcement, it should require carriers to establish and support a nationwide slamming complaint line and a nationwide presubscribed carrier information line.

Respectfully submitted,

Eusebio Ross for Peter Bluhm  
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September 15, 1997

Certificate of Service

I, Peter M. Bluhm, hereby certify that on this 15th day of September, 1997, copies of the foregoing comments of the state of Vermont Public Service Board were also served by first class mail, postage prepaid, to the following persons.

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